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The Relevance of the Burke-Paine Controversy to American Political Thought

Francis Canavan, S.J.

Thomas Paine's social-contract theory, which asserts the protection of individual rights as the sole end of civil society and the consent of the majority of individuals as the sole source of government's authority, may seem to be better suited to the democratic Constitution of the United States than Edmund Burke's theory of prescription of government. Burke's theory is based on the rational moral goals of civil society, not on the supremacy of the people's or any other will. It asserts that the natural ends of society are prior to rights as Paine and other radical democrats conceived of them and that natural obligation is prior to and controls consent. Burke can therefore afford us a more realistic interpretation of popular consent and of the Constitution as the political form that makes us a people. He also offers a useful corrective to the currently popular view of the Supreme Court's function as being primarily to protect an ever-expanding array of constitutional rights. Burke was no democrat but he may help democrats to overcome the limitations of the liberal contractarian model of society.

Three years after the framing of the Constitution of the United States in 1787, a debate broke out on the other side of the Atlantic which has come down to us as the "Burke-Paine controversy." It took place in Great Britain, not America, and it concerned the merits of the French, not the American, Revolution. Yet the issues that were argued in it were so basic to democratic political theory that they are still worth reflecting upon at the bicentennial of our Constitution.

First, however, we should admit that the so-called controversy between Edmund Burke and Thomas Paine was a noncontroversy insofar as one of the participants refused to acknowledge the other. Burke published his *Reflections on the Revolution in France* in 1790, and he did not have Paine in mind when he wrote it. Paine, however, replied to Burke's book in 1791 with *The Rights of Man*, part 1. In the same year, in *An Appeal from the New to the Old Whigs*, Burke gave Paine the back of his hand by quoting him at length as a typical expression of the views of British sympathizers with the French Revolution, while disdaining to name him or his book. Paine responded with *The Rights of Man*, part 2, in 1792, then left the country before he could be tried on a charge of seditious libel. So the controversy ended, if indeed it can be said to have taken place.

Yet Burke and Paine did address themselves to the same point at issue: What is government's title to legitimate authority? In defending their positions on this point, the two men wrote from quite diverse political philosophies and worldviews. I have explained what these were in a recently published book[1] but it will be necessary to summarize them here in order to discuss their relevance to American political thought today.

The starting point of Paine's political thought is the individual man endowed by God with natural rights in a prepolitical state of nature. It is not a presocial state because Paine sees men even there as living in a network of free contractual relationships which constitute society. These relationships would suffice for all the needs of human life were it not for the wickedness that leads people to violate the rights of others. Civil society becomes necessary only because government and law are necessary for the protection of rights.

Rights for Paine, then, are the beginning and end of civil society. The political community comes into being by an exercise of the individual's right to govern himself and its purpose is to protect individual rights so that *everyman* may pursue his own interests:

> Every man wishes to pursue his occupation, and to enjoy the fruits of his labors, and the produce of his property, in peace and safety, and with the least possible expense. When these things are accomplished, all the objects for which the government ought to be established are answered.[2]

Since men's interests, however, are in natural harmony, if government effectively protects rights, enlightened self-interest will do the rest. The laws of trade and commerce, Paine explains, "are followed and obeyed because it is the interest of the parties so to do, and not on account of any formal laws their governments may impose or interpose."[3] It follows that "government is no farther necessary than to supply the few cases to which society and civilization are not conveniently competent."[4]

But since government is after all necessary, men have created it by individual consent. Each one exercised his natural right of self-government to contract with other equally sovereign individuals: "The *individuals themselves*, each in his own personal and sovereign right, *entered into a compact with each other* to produce a government:

and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist."[5] The only legitimate source of political authority is, then, the individual's consent as an exercise of his natural right of self-government.

This right, which God gave to man as man at the Creation, is imprescriptible and cannot be lost by any number of centuries of subjection to governments founded on other and false principles. History and the passage of time are of no effect: "Every generation is equal in rights to the generations which preceded it, by the same rule that every individual is born equal in rights with his contemporary."[6]

Of course, by entering civil society, the individual does transfer sovereignty. But he transfers it to society, in whose authority he remains an equal shareholder, and not to the person or persons who constitute society's government. "Sovereignty, as a matter of right, appertains to the Nation only, and not to any individual." From this there follows a radical conclusion which was the focus of Burke's attack on democratic ideology: "A Nation has at all times an inherent indefeasible right to abolish any form of Government it finds inconvenient, and establish such as accords with its interest, disposition and happiness."[7] No act of a founding generation can bind later generations: "Every age and generation must be as free to act for itself, *in all cases*, as the ages and generations which preceded it. . . . That which a whole nation chooses to do, it has a right to do."[8]

Furthermore, although the individual transfers sovereignty to the nation, his natural right of self-government remains the foundation of a civil right to take an equal part in government or at least in the choice of the representatives who will do the actual governing: "The true and only true basis of representative government is equality of rights. Every man has a right to one vote, and no more, in the choice of representatives."[9] The same equality of rights issues in the principle of majority rule: "The social compact, or the principle by which society is held together, requires that the majority of opinions becomes the rule for the whole, and that the minority yields practical obedience thereto."[10]

Paine's political theory, then, is founded on the concepts of rights, consent, and the social compact which brings into being the indefeasible sovereignty of the majority will. Consent, as the exercise of the individual's right of self-government, is the source

of political authority. The protection of individual rights is its end. The sovereignty of the majority is authority's only legitimate form.

It was against this type of political thinking that Burke, years before he read Paine, formulated his doctrine of prescription as a title to political authority. He did not mean by it that any government that lasts a long time becomes a legitimate government by that mere fact. He meant, rather, that a government which governs well has the legitimate claim to the obedience of its citizens, even if it was illegitimate in its origins, and the longer it has governed to the benefit of its people, the stronger its claim on their allegiance.

Behind this thesis there are certain premises. They are that man is designed by God and nature for life in civil society, without which he cannot arrive at the full development of which his nature is capable. The potentiality for that development sets the goals of human life. The goals of human life, in turn, are the source of moral obligation, both individual and political, because man is morally obliged to consent to his nature's goals and to the necessary means of achieving them. Obligation is thus prior to consent and commands consent.

In like manner and for the same reason, natural purposes are prior to natural rights. Men do have rights which at bottom, beneath all modification by history and convention, can be called natural. But they are rights because they are necessary to the satisfaction of inherent natural needs and the achievement of the inherent goals of human nature. A natural right, to Burke, is not an antecedent moral empowerment to do one's own will, limited only by the obligation to respect the equal rights of others, as it was for Paine.[11]

Burke's political theory, therefore, does not begin with individual rights in a "state of nature" for the protection of which men create a civil society by contractual consent. Even though Burke could and sometimes did talk the language of the state of nature and the social contract, his premises were those of a natural teleology set in the framework of the Christian doctrine of the divine creation of the world. There was room in his political thought for government by the consent of the governed, but the teleology controlled the consent, as obligation controlled, defined, and limited rights.

Burke's objection to democracy was not to a form of govern-

ment simply as such. "I reprobate no form of government merely upon abstract principles," he said. "There may be situations in which the purely democratic form will become necessary," though he did not think it would be desirable in any large country.[12] The object of his criticism was the basic principle of the democratic ideology of his day in Great Britain and France. This was, as Burke phrased it, "that the *people*, in forming their commonwealth, have by no means parted with their power over it,"[13] and that consequently they retain "the right to change a fixed and tolerable constitution of things at pleasure."[14] Burke saw in this principle an assertion of sheer voluntarism: the people's will is supreme because it is their will.

On the contrary, he said, if a country is to have a democratic government, "where popular authority is absolute and unrestrained," it is "of infinite importance" that the people "should not be suffered to imagine that their will, any more than that of kings, is the standard of right and wrong." Their power, like all power, "to be legitimate must be according to that eternal immutable law, in which will and reason are the same."[15] The power of the people does not derive from the natural supremacy of their will but from the rational moral goals of human nature as created by God, in whom will and reason are the same. Purpose, in this sense, is prior to consent as the source of political authority and of the corresponding obligation to obey it.

Of these two contrasting views, Paine's and Burke's, on the origin and purpose of political authority, Paine's seems at first glance better suited to a democratic Constitution and an individualistic liberal society such as ours. As the late Alexander M. Bickel said, we operate in this country on a "liberal contractarian model" of society which "rests on a vision of individual rights that have a clearly defined, independent existence predating society and are derived from nature and from a natural, if imagined, contract. Society must bend to these rights."[16] In the minds of many, not least in the minds of some members of the U.S. Supreme Court, it is our glory to bend society to an ever-expanding array of allegedly constitutional rights. But if one finds the liberal contractarian model of society an inadequate one, then Burke's political thought may offer us a better way of thinking about our polity.

It may even throw light on consent as the source of the authority of the U.S. Constitution. Article VII of that document, providing for its ratification by popularly elected conventions in the sev-

eral states, clearly assumes that the Constitution will derive its authority from the consent of the people. The Constitution is also capable of being amended, or even repealed by the same people, as Article V shows. But Burke himself held a consent doctrine: "In all forms of Government the people is the true Legislator; and whether the immediate and instrumental cause of the Law be a single person, or many, the remote and efficient cause is the consent of the people, either actual or implied; and such consent is absolutely essential to its validity."[17] Nor did Burke object to the U.S. Constitution because of its origin in popular consent. What may be his only comment on it was: "The people of America had . . . formed a constitution as well adapted to their circumstances as they could."[18] On the other hand, the U.S. Constitution certainly is not an enactment into law of Burke's political theory—far from it—and no such pretense is made here. The most that can be said is that his theory may offer some useful advice on how to understand our or any other constitution.

One should not, for example, think that our Constitution canonizes the doctrine of the untrammeled sovereignty of the popular majority of the present generation. Article V describes the only legitimate manner of amending the Constitution, which is not by popular majority, and in so doing, it lays the hand of the past on the present. Burke himself argued that majority rule is not "a law of our original nature." On the contrary, he said, "such constructive whole, residing in a part only, is one of the most violent fictions of positive law, that ever has been or can be made on the principles of artificial incorporation."[19] History tends to bear Burke out; majority rule is a convention, adopted for good practical reasons, but certainly not founded on a natural right of the majority to decide for the whole.[20] Our Constitution was originally ratified by the unanimous consent of the states which were to form the Union and, in ratifying it, they prescribed a procedure and a constitutional majority for amendments that was to be binding for the future until it was changed by that same constitutional majority. The conventional rule adopted by the past still binds the present generation.

What the consent of the governed to their constitution may mean is not the simple question that much of democratic ideology makes it out to be. It hardly means individual consent, despite John Locke's opinion that nothing can make a man a member of the commonwealth "but his actually entering into it by positive

Engagement, and express Promise and Compact."[21] I, for one at least, cannot remember the day when an agent of the U.S. government came and asked me for my consent to the Constitution and the laws of the United States. My consent seems rather to have been presumed and rightly so because, as Burke put it, "the presumed consent of every rational creature is in unison with the predisposed order of things."[22] We are born to our country as we are born to our parents, and our country legitimately presumes our consent because we are morally obliged to give it.

Nor need a people's corporate consent to their constitution be originally given and periodically renewed through a plebiscite or referendum. Burke sees prescription as accompanied by the people's legitimately presumed consent:

> It is a presumption in favor of any settled scheme of government against any untried project, that a nation has long existed and flourished under it. It is a better presumption even of the *choice* of a nation, far better than any sudden and temporary arrangement by actual election. Because a nation is not an idea only of local extent, and individual momentary aggregation, but it is an idea of continuity, which extends in time as well as in numbers, and in space. And this is a choice not of one day, or one set of people; it is a deliberate election of ages and generations; it is a Constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time. It is a vestment, which accommodates itself to the body.[23]

That the American people today consent to their Constitution seems clear beyond cavil. It is still a question on what grounds we make the judgment that they do consent. Merely to say, as Paine would,[24] that we consent because, having the power to repeal or radically amend the Constitution, we do not do so, seems to be a superficial answer. Burke's view of consent as manifested through long historical experience is more realistic. Our Constitution, two hundred years after it was written, is now a deliberate election of ages and generations and a vestment which has accommodated itself to the body politic.

We can go beyond Burke and say that the body politic has accommodated itself to the Constitution. To an extent not precisely determinable but surely real, the Constitution has made us the people that we are today. Our consent to the Constitution is to

that extent a consent to our own national identity. It is therefore something more than a decision revocable at will.

There is on our political agenda at present no proposal for radical change in the Constitution. But if such a proposal were before us, it is dubious if we could discuss it in purely legal and non-moral terms. Granted that, provided we follow the prescribed procedure for constitutional amendments, we are legally able to change the Constitution as we will, we would still have to ask whether we are morally free to do so. Is the Constitution's only validity that it represents the will of an existing majority which that majority may change as it wishes? Or are we morally obliged to maintain our Constitution in its main and substantial lines until serious and incorrigible abuse of power releases us from that obligation?

Burke's doctrine of prescription of government affirms just such an obligation. It is not an absolute obligation but it is one that binds us until a higher moral principle releases us from it. The higher moral principle, like the obligation which it overrides, derives from the rational moral goals of civil society. We are morally obliged to pursue those goals, to follow the Constitution because it serves them, and to change or abolish it only when and because it has become a serious impediment to them.

What the goals of civil society may be is, of course, a controversial question, perhaps the most basic one of political theory. It is at least an open question whether those goals can be reduced to the protection of rights. Burke and a long tradition before him would say no, but Paine would say yes, and our contemporary civil libertarians seem to say the same.

In this country the most basic legal rights are constitutional rights. The Constitution establishes a national government endowed with powers that may be broad but are nonetheless limited. The limits on that government's power are implicit in the fact that only certain powers were granted to it in the Constitution; some limits are also stated explicitly in the so-called Bill of Rights. In the American political system, constitutional rights consist in these limits on the powers of government: our constitutional rights are immunities from governmental action. The question of rights thus becomes the question of the limits which the Constitution places on the powers of government.

Through its interpretation of section 1 of the Fourteenth Amendment, the U.S. Supreme Court has extended to the states

almost all of the limitations imposed on the national government, and more besides. Issues of constitutional rights now arise far more often at the state and local than at the national governmental level. But the issue is always the same: Has government, at whatever level, exceeded its constitutional powers and violated the constitutional limits on them?

Underlying this constitutional question, however, is a deeper one: Are both the powers and the limits of government established solely or primarily in order to protect individual rights? If they are, then this goal must guide and control the interpretation of the Constitution. Indeed, in the mind of many civil libertarians today, this goal not only controls but replaces the Constitution, as appears in the current debate over original intent as the principle of constitutional interpretation.

The issue in the debate may be phrased in these terms: Do we find the meaning of a constitutional clause by determining what those who framed it intended and those who ratified it understood it to mean? Or is the original intent unknowable or, if known, irrelevant to American society today? If the original intent is either unknowable or irrelevant, it is tempting to jump to the conclusion that the Constitution is a blank check which the Supreme Court may fill in as it thinks most appropriate for the protection of rights.

As a respectable example of those who subscribe to this conclusion we may take one of our leading constitutional historians, Leonard W. Levy. In a recent book he says that the Court from the beginning of its history has revealed "an audacious capacity . . . to read the Constitution to mean whatever it wanted." Truth to tell, he feels, the Court could not have done otherwise:

> The Constitution itself . . . is too concise and ambiguous to be any more than a point of departure in judicial decisions. . . . Justices who look to the Constitution, its Bill of Rights, or the Fourteenth Amendment for more than a Delphic phrase delude themselves. . . . There is surely no clear word in the Constitution on . . . most of the subjects of great import with which the Court must deal.[25]

One might conclude that if the Constitution gives the Court so little guidance, the justices should confine themselves to deciding cases in statute or common law and leave the interpretation of the Constitution to the elected branches of government, but Professor Levy draws the opposite conclusion. "The Supreme Court," he

says, "is and must be for all practical purposes a 'continuous constitutional convention' in the sense that it must keep updating the original charter by reinterpretation—and in the sense that it simply cannot decide cases on the basis of what the Constitution says." He approvingly quotes Chief Justice Earl Warren as saying on the occasion of his retirement that constitutional law is framed by nine men "who have no one to be responsible to except their own consciences."[26] Yet Levy has no doubt but that what the nine men or a majority of them say the Constitution means is what it means and is the supreme law of the land.

There seems to be an element of voluntarism, not to say of arbitrariness, in Levy's conception of constitutional law, a conception which is important because so many share it. The Court must interpret the text of the Constitution, to be sure, but it does not follow that the text is so ambiguous that it will bear any meaning that a majority of the justices choose to put on it. The justices have the right to interpret it only because they have the duty to apply it to the decision of cases as they apply other laws. They have no mandate to make the Constitution say what in fact it does not say.

The civil libertarians, however, have reason to want a Constitution almost devoid of intrinsic meaning. "Judge Learned Hand," Professor Levy tells us, "observed that when a judge must pass on a question of constitutional law, 'The words he must construe are empty vessels into which he can pour nearly anything he will.' "[27] But it is taken for granted that meaning will be poured in, that it will be quite specific, that it will have the force of the supreme law of the land, and it will be the meaning that the civil libertarian wants. If it is not, he will denounce the judge for betraying the Constitution.

From the civil libertarian point of view constitutional rights are ends in themselves which should be expanded as far as possible. The more rights, the better; the broader the construction of those rights, the better; and the more procedural safeguards for them, the better. This interpretation of the Constitution depends on a steady separation of means from ends. If constitutional rights are ends in themselves, we need not, nay, may not ask what higher ends they serve as means. So, for example, we may not ask why we need and want a constitutionally guaranteed freedom of speech and press. We must treat the freedom as an absolute. Yet an intelligent interpretation of the First Amendment's freedom of speech

and press clause would seem to require an investigation of its purposes. If we do not know why we want it and what we hope to achieve by it, it is hard to make sense of it.[28]

Greater minds than Edmund Burke's have thought about the goals of civil society and have thought more deeply and broadly than he did. But, as against Thomas Paine, he had the merit of recognizing that purposes are prior to rights, and obligation is prior to consent. We may learn from him that rights are not ends in themselves but are means to ends higher than themselves. Having learned this, we may then ask where we get the goals of civil society. Do we derive them from some conception of natural good and natural justice? Or do we arbitrarily posit them as expressions of individual or popular will?

If we get our social goals from some shared idea of natural good and justice, we can speak of the common good as the global goal of civil society, as James Madison seemed to do. It is well known and endlessly repeated that in *Federalist*, No. 10, he stated the classical argument for pluralism as the fundamental guarantee of liberty against the tyranny of the majority in a republic. But in restating that argument at the end of *Federalist*, No. 51, he said: "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." One should not press Madison's words too hard, but he seems to have contemplated a less than radical pluralism, and to have assumed a degree of community that allowed for commonly recognized principles of justice and the common good.

If, however, we combine Madison's pluralism with positivism, we get interest-group liberalism, for which there are no such rationally discernible principles. According to this theory, the democratic process will be stable if it is kept sufficiently open so that all groups can participate in it and feel that the game is worth the candle. The process will therefore not need support from any principles that transcend it. Self-interest is the adequate motor force of the social and political system, and all that the system needs in order to run without breaking down is participants enlightened enough to see that they will best serve their interests by pursuing them through the system.

It would be unfair to attribute this kind of liberalism to Paine, since he believed strongly in natural rights as an objective stand-

ard of justice. But his belief that individual rights were an adequate foundation and goal for society foreshadows the inner weakness of interest-group liberalism which Thomas Spragens has well described:

> The pluralist model may impute more stability to contemporary secular democracy than it in fact possesses. Once he has interpreted American democracy as an embodiment of interest-group liberalism, the pluralist takes note of the relative continuity and stability of American democracy and concludes by imputing stability to interest-group liberalism. In fact, it may well be that, the more fully the American polity approximates the pattern of interest-group liberalism, the more unstable it may become. To the extent that the policies of such a system are increasingly perceived as the product of purely self-interested logrolling, the more that system will be subjected to intensified demands and afflicted by loss of support. The system loses support because it loses its moral legitimacy, and intensified demands are placed on it as each group seeks to compensate for the real or imagined influence of its rivals. For both reasons, the system suffers from an erosion of its authority and, with it, a diminution of its capacity to govern effectively. The system thus becomes progressively less stable.[29]

A common good implies standards of right and wrong which transcend individual opinions and desires. Again, it would be unfair to Paine to attribute contemporary moral relativism to him, but we can see today's relativism as a radicalization of the individualism which lies at the base of his and the liberal tradition's thought.

Thus, for example, we have John Rawls telling us, in *A Theory of Justice*, that "the self is prior to the ends affirmed by it" and that "we should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior."[30] As the title of his book indicates, Rawls proposes a theory of justice, but it is a purely formal theory which regards all subjectively desired ends as equally valid. Similarly, Ronald Dworkin, in his essay *Liberalism*, takes the equality of citizens before the law as meaning that "government must be neutral on what might be called the question of the good life" and that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."[31] The priority of the individual's right to choose his own ends precludes any conception of a substantive common good.

Whether such a political theory is viable, let alone desirable, is a major issue in our pluralistic liberal society. Rawls, Dworkin, and a host of liberal intellectuals, jurists, and journalists urge us to found a just society on the principle of equality. But the equality they offer us is what George Will has aptly called the moral equality of appetites.[32] A society based on this foundation can have no unifying bond other than agreement to follow certain legal and political procedures because it cannot agree on substantive moral ends. Liberal relativists argue that agreement on procedural form without moral substance is enough, and their belief follows logically from their atomistic conception of society as a collection of sovereign individuals. But whether a society so conceived and so dedicated can long endure is questionable and is increasingly an issue in our law and politics.

Burke's doctrine of prescription is addressed narrowly to the question of government's title to political authority. But it is part of a broader view of a nation as a corporate entity, with a corporate common good, which perdures through time and lives upon a common moral and political tradition. Like Paine, Burke is not a major figure in the history of political philosophy. But he was surely a more profound thinker than Paine and offers us a richer and fuller way of understanding our polity than one founded on the sovereign individual and his rights.

Notes

[1] *Edmund Burke: Prescription and Providence* (Durham, N.C.: Carolina Academic Press, 1987).

[2] *The Rights of Man*, in *The Complete Works of Thomas Paine* (New York: Freethought Press Association, 1954), 2: 194.

[3] *Ibid.*, p. 155.

[4] *Ibid.*, p. 153

[5] *Ibid.*, p. 48

[6] *Ibid.*, p. 42

[7] *Ibid.*, p. 131

[8] *Ibid.*, pp. 13-14.

[9] *Dissertation on the First Principles of Government, Complete Works*, 2: 365.

[10] *Ibid.*, pp. 373-74

[11] *Rights of Man*, p. 98.

[12] *Reflections on the Revolution in France, Works* (the Rivington edition), 5:230.

[13] *An Appeal from the New to the Old Whigs, Works*, 6: 200.

[14] *Ibid.*, p. 230.

[15] *Reflections*, 5: 178-80.

[16] *The Morality of Consent* (New Haven: Yale University Press, 1975), p.4.

[17] *Tract relative to the Laws against Popery in Ireland, Works*, 9: 348.

[18] *The Parliamentary History of England, from the Earliest Period to the year 1803* (London: T. C. Hansard, 1806-1820), 29: 365.

[19] *An Appeal*, 6: 212.

[20] See, for example, S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge: Cambridge University Press, 1936), pp. 133-36.

[21] *Second Treatise of Government*, sect. 122.

[22] *An Appeal*, 6: 207.

[23] *Speech on the Reform of the Representation, Works,* 10: 96-97.

[24] *Rights of Man*, p. 16.

[25] *Constitutional Opinions* (New York and Oxford: Oxford University Press, 1986), p. 232.

[26] *Ibid.*, p. 235.

[27] *Ibid.*

[28] I have developed this thesis at length in *Freedom of Expression: Purpose as Limit* (Durham, N.C.: Carolina Academic Press, 1984).

[29] *The Irony of Liberal Reason* (Chicago and London: University of Chicago Press, 1981), p. 303.

[30] Excerpt in *Liberalism and Its Critics*, ed. Michael J. Sandel (New York: New York University Press, 1984), p. 57.

[31] Excerpt *ibid.*, p. 64.

[32] *Statecraft as Soulcraft* (New York: Simon and Schuster, 1983), p. 158. For an eloquent defense of "the moral equality of appetites," see the dissenting opinions in *Bowers v. Hardwick* (the Georgia sodomy law case), 1065 S. Ct. 2841, 2848 ff. (1986).